

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

MOOG INC.,

Plaintiff,

Case No. 1:22-CV-187  
(LJV)

vs.

November 29, 2022

SKYRYSE, INC.,  
ROBERT ALIN PILKINGTON,  
MISOOK KIM,  
DOES NOS. 1-50

Defendants.

VIA ZOOM FOR GOVERNMENT VIDEOCONFERENCE

TRANSCRIPT OF ORAL ARGUMENT  
BEFORE THE HONORABLE LAWRENCE J. VILARDO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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**PRESENT:** **STEPHEN KOO, CFO of Skyrise, Inc.**

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1 (Proceedings commenced at 2:35 p.m.)

2 THE COURT: Okay. Can everybody hear me?

3 THE CLERK: Yes, Judge. I'll call the case.

4 United States District Court for the Western District  
5 of New York is now in session, the Honorable Lawrence J.  
6 Vilardo presiding.

7 22-CV-187, Moog, Inc. versus Skyryse, Inc., et al.

8 Attorneys Kazim Naqvi, Reetuparna Dutta, Rena Ando,  
9 and Robert Fluskey, Jr. appearing on behalf of the plaintiff.

10 Attorneys Douglas Lumish, Gabriel Gross, Terrance  
11 Flynn, Julianne Osborne, Joseph Lee, and Arman Zahoory  
12 appearing on behalf defendant Skyryse, Inc. Also present is  
13 Stephen Koo, who is chief financial officer of Skyryse, Inc.

14 Attorneys Anthony Green and Alexander Truitt  
15 appearing on behalf of defendants Pilkington and Kim.

16 All parties are appearing by videoconference, and  
17 this is the date set for an oral argument.

18 THE COURT: Good afternoon, everybody. Let me start  
19 by saying what I've been saying at the beginning of all of  
20 these proceedings that we've done by Zoom or by phone, and  
21 that is that no one is to record or rebroadcast this in any  
22 way, and that's under penalty of contempt and the sanctions  
23 that might go along with it.

24 So who is going to argue for plaintiff, first of all?

25 MS. DUTTA: Reena Dutta, Your Honor, Hodgson Russ.

1 THE COURT: Okay, Ms. Dutta. Who's going to argue  
2 for Skyryse?

3 MR. GROSS: That's me, Your Honor, Gabriel Gross.

4 THE COURT: Okay, Mr. Gross. And who's going to  
5 argue for the individual defendants?

6 MR. TRUITT: Myself, Your Honor, Alexander Truitt.

7 THE COURT: Good. Okay. So this is the defendant's  
8 objection to Judge McCarthy's report and recommendation, and  
9 really it's the objection just to the first four pages, I  
10 think, of the report and recommendation that deal with the  
11 jurisdictional issues and Judge McCarthy's deciding that the  
12 preliminary injunction would take place in this Court and then  
13 the motion for jurisdiction and venue be decided after that.

14 So, Mr. Gross or Mr. Truitt, whoever's going to take  
15 the lead, you can begin.

16 MR. GROSS: I'm happy to, Your Honor, thank you.

17 Your Honor, I think there's really three reasons why,  
18 respectfully, we think Magistrate Judge McCarthy erred in the  
19 report and recommendation.

20 What he decided was that two stipulations the parties  
21 entered into in the early days of the case reflected explicit  
22 consent to this Court's authority over them, jurisdiction over  
23 them and venue, for purposes of resolving a substantive-merits  
24 motion, the preliminary injunction motion.

25 First, he got it wrong on the text. The text of

1 those stipulations, in order to support his conclusion, would  
2 need to reflect a meeting of the minds by the three  
3 defendants, all of whom live in California, and the plaintiff,  
4 that they intended to submit themselves indefinitely until the  
5 resolution of the substantive motion to this Court's authority  
6 and jurisdiction and venue. And the text of those  
7 stipulations, which I'll gladly walk through with the Court  
8 today, just doesn't reflect that sort of meeting of the minds  
9 or that sort of intent by the parties.

10 THE COURT: So let me stop you there, and let me ask  
11 you, because I've parsed these stipulations pretty closely.

12 So, the most troubling paragraphs for you, I think,  
13 are paragraph -- the final bullet point in paragraph 6, and  
14 the stipulation that's March 16th, the second stipulation,  
15 which Judge McCarthy relies on. And that stipulation provides  
16 that the preliminary injunction hearing would be held subject  
17 to the Court's availability.

18 And he says that because the Court, throughout this  
19 stipulation, is the Western District of New York, that the  
20 Court there needs to be the Western District of New York.  
21 That makes some intuitive sense to me.

22 And then when you couple that with the last  
23 paragraph, paragraph 12, of the other stipulation, the --  
24 the -- I think the earlier of the two, if I recall correctly,  
25 yeah, March 11th, that says that the stipulated order remains

1 in effect until a hearing on the preliminary injunction takes  
2 place and a final ruling on the merits is issued.

3 So -- so, tell me why those two provisions read in  
4 conjunction with one another don't suggest that  
5 Judge McCarthy's right.

6 MR. GROSS: They -- they don't, Your Honor, for a  
7 number of reasons.

8 One is that, to go to your first point, about the  
9 last bullet of paragraph 6 in the March 17th stipulation,  
10 tentatively set an aspirational hearing date subject to the  
11 Court's availability. The purpose for this, Your Honor, is  
12 because the parties met in good faith and agreed to advance  
13 this case as much as they could subject to the defendant's  
14 challenges to jurisdiction and venue.

15 And the way they did that was by asking for a hearing  
16 date from which they could work backwards and set a briefing  
17 schedule, and also arrange for expedited discovery that the  
18 plaintiff claimed it needed. And that's what the parties  
19 agreed to.

20 And they agreed to do it, Your Honor, in both of  
21 these stipulations subject to -- or, excuse me, in the  
22 March 17th stipulation expressly, subject to any and all other  
23 challenges to the Court's jurisdiction.

24 There is consent, to be sure. There is a limited  
25 consent to this Court's jurisdiction and venue for purposes of

1 these two stipulations. And, Your Honor, the purposes of  
2 these stipulations are very clear on their face. And they say  
3 a lot, but they don't say for purposes of resolving a  
4 merits-based motion that speaks to things like the likelihood  
5 of success that the Court would need to pass on in a ruling on  
6 a preliminary injunction motion.

7 And if -- if -- if the Court would indulge me, I'll  
8 be happy to go through in broad strokes the -- the types of  
9 purposes of the motion, the things we actually see in the text  
10 that I think put paragraph 6 and paragraph 12 into -- into  
11 really clear context that we think, respectfully, Magistrate  
12 Judge McCarthy didn't consider and -- and should have.

13 THE COURT: You're going to point first to  
14 paragraph 13 of the second one that says there's an agreement  
15 set forth herein solely for purposes of expedited discovery,  
16 aren't you?

17 MR. GROSS: Well, that is one of them. And you're  
18 steps ahead of me, Your Honor, of course.

19 And if you ever wanted to see a clearer manifestation  
20 of the purpose of a stipulation, see what it says about the  
21 purpose. And you read the one that I was going to begin with,  
22 solely for the purposes of expedited discovery.

23 I think that actually may be a touch overstated,  
24 because that same stipulation also talks about a briefing  
25 schedule, so it's not just expedited discovery but a briefing

1 schedule. But it's really logistical in nature. It says,  
2 hey, we're gonna agree to exchange some discovery, move it  
3 forward quickly according to a schedule and, Court, you can  
4 hold us to it, we will submit to your authority and venue for  
5 purposes of this stipulation. And that's --

6 THE COURT: Is there any -- one of the things I have  
7 a tough time wrapping my head around is how I could enter a  
8 preliminary injunction granting merits-based relief against a  
9 party over whom I might not have jurisdiction. That --  
10 that -- that -- that concerns me. I'm sure it concerns you,  
11 too.

12 Tell me, is it -- is there any caselaw addressing  
13 this sort of situation where parties stipulate to one court  
14 granting injunctive relief -- and I'm presuming that the other  
15 side is correct here on that. So is there any caselaw  
16 addressing the parties stipulating to a court's granting  
17 injunctive relief before the jurisdictional issue was decided?

18 MR. GROSS: Your Honor, we haven't been able to find  
19 any caselaw with that precise fact pattern.

20 THE COURT: Ms. Dutta, have you found anything?

21 MS. DUTTA: Your Honor, we have not. But I would  
22 just like to note that Magistrate Judge McCarthy found there  
23 was jurisdiction for purposes of the preliminary injunction.

24 THE COURT: I get it. I don't want to get to that.  
25 I just want to know whether there's any caselaw precedent,



1 that's all. And I'm going to give you plenty of time to make  
2 your arguments.

3 So, go ahead, Mr. Gross.

4 MR. TRUITT: Your Honor, in our opening -- sorry, in  
5 our reply brief and our opening brief, you know, we did cite  
6 to cases that established a general principal that the Court  
7 must establish it has jurisdiction over the parties before it  
8 can make. And then in a Rule 12(h)(1), you know, it sets  
9 forth the only basis by which, you know, the Court can find  
10 that the parties have waived jurisdiction, you know,  
11 eliminating the specific and general appearance problem that  
12 used to exist.

13 And I think that's where this dispute really falls  
14 into, is that we're entering into a stipulation that has a  
15 clear reservation of rights, it was for a very limited  
16 purpose, and the plaintiff is arguing that this is a general  
17 appearance that requires us to consent to jurisdiction now.

18 THE COURT: Okay. I got it. I got it. I really  
19 wanted to focus on just that specific question, and it sounds  
20 like there isn't any caselaw.

21 So, go ahead, Mr. Gross.

22 MR. GROSS: Thank you, Your Honor.

23 We -- we were troubled by the same thing that I think  
24 troubled you. But the 2nd Circuit and other circuit have  
25 spoken to a very similar issue. It's the Arrowsmith case that

1 we've cited to Your Honor in our briefing from the  
2 2nd Circuit, it's almost 60 years old, it's from 1963. And in  
3 that case, the 2nd Circuit -- it remanded the case back to the  
4 district court after the district judge, when faced with a  
5 Rule 12(b)(6) motion, a personal jurisdiction challenge, and a  
6 venue motion, decided to rule and dismiss the case under  
7 12(b)(6) without addressing the threshold jurisdictional and  
8 venue issues.

9 Now what the 2nd Circuit held there is -- on  
10 remanding it is that the district court needed to consider the  
11 issues of, first, jurisdiction, and then if those go in the  
12 plaintiff's way, then venue, and if those issues fall the  
13 plaintiff's way, then you can reach consideration of the  
14 merits issues, like in the 12(b)(6) motion.

15 And I think that's -- and I think that's ample  
16 guidance for the Court to do here. Rather than reaching the  
17 merits of a substantive injunctive motion, the Court needs to  
18 first ascertain whether it has authority over the parties  
19 before it before getting to that point.

20 And, Your Honor, this is actually a fact pattern that  
21 comes up in a similar circumstances -- in a similar  
22 circumstance in other IP cases. And so the federal circuit,  
23 which of course hears patent appeals, or appeals of patent  
24 cases, has dealt with this on a number of occasions where  
25 cases in fast-moving dockets get rather far along on the

1 merits while a motion to transfer venue or a motion  
2 challenging jurisdiction or the propriety of venue is pending.  
3 And so I'd refer to the Court In Re: Google and In Re: Apple  
4 cases that we've cited in our brief, too.

5           The federal circuit applies different circuits' law,  
6 depending on the districts that, of course, the patent cases  
7 arise from. And in In Re: Google, the Court made the same --  
8 the same point, that a venue transfer motion should be a top  
9 priority, and that if a court reaches that motion after the  
10 case has proceeded along the merits, then the lower court  
11 shouldn't be considering its familiarity with the case that  
12 it's acquired in the months that have passed. It actually  
13 held that to be irrelevant to the transfer decision when the  
14 Court reaches to it.

15           And in the Apple case, the federal circuit held that  
16 it was actually legal error for the Court to consider the work  
17 and the -- the steps it had taken on the merits of the case  
18 before -- or, when it reached the transfer motion and weighed  
19 the transfer considerations.

20           THE COURT: Of course, in neither of those cases  
21 there was a -- was there a stipulation like the one here.

22           MR. GROSS: No, Your Honor, this -- this scenario is  
23 unique. But what's also unique about these stipulations is  
24 that on their face, the consent is limited to the purposes of  
25 the order.

1           So with that, if I could turn to the language of the  
2 stipulations, I think it gives us all some guidance here. And  
3 this wasn't part of the briefing, it wasn't part of Magistrate  
4 Judge McCarthy's analysis, because this issue never came up  
5 during the initial briefing. I think it tells you something  
6 about the strength of the consent argument that the -- Moog  
7 never raised it in its first brief.

8           Now to be sure, it argued that by participating in  
9 some litigation events, the defendants have forfeited their  
10 right to challenge the Court's jurisdiction, but -- but it did  
11 not make an explicit consent argument and say that the  
12 stipulations themselves affected a waiver of the right to  
13 challenge venue for these purposes. That only came up first  
14 by email, and then through some supplemental briefing four  
15 months later right before Magistrate Judge McCarthy issued his  
16 decision when the defendants didn't have an opportunity to  
17 respond.

18           THE COURT: By the same token -- by the same token,  
19 defense counsel certainly contemplated a hearing in front of  
20 me, right? There's multiple citations to that in the past.

21           MR. GROSS: Oh, to be -- to be sure, Your Honor. In  
22 early proceedings and hearings before the magistrate, we then,  
23 like today, knew we were in one court and one court only.  
24 We -- we -- unless and until the case gets transferred or  
25 dismissed and it ends up in a court like the Central District

1 of California, Your Honor is presiding over this case, and we  
2 are assuming that a preliminary injunction proceeding will be  
3 before Your Honor until we're told it's not. But respectfully  
4 we think it shouldn't be.

5 THE COURT: Okay.

6 MR. GROSS: So, if we could, I think it's useful to  
7 look at the first of the two stipulations, that's ECF number  
8 25. And this -- the date matters here, this is March 11th.  
9 So the complaint was filed March 7th. This is just four days  
10 after the complaint hit the docket in this Court, and the  
11 parties were meeting/conferring to address what Moog said was  
12 its need for very urgent relief. And one of the things they  
13 did was enter into this -- this stipulation.

14 So I won't -- I'll spare the Court the details of  
15 going through paragraph by paragraph, but I think  
16 categorically, we can -- we can see what the purposes of this  
17 stipulation are by reference to its text.

18 The title is helpful. It's a stipulation and  
19 proposed order regarding the production of information, data  
20 preservation, and forensic searching. That's it. It doesn't  
21 say on its title or anywhere on the document that it's a  
22 stipulation agreeing to the Court's jurisdiction and venue for  
23 purposes of resolving substantive motions.

24 So paragraphs 1 through 7, and 9, those all relate  
25 generally to preserving evidence and not using discoverable

1 information. I skipped paragraph 8 because that's a little  
2 different. Paragraph 8 is a -- basically an admonition that  
3 nobody should violate this stipulation.

4 The next one I haven't covered is paragraph 10. This  
5 is really a scheduling provision. It took the TRO and the  
6 preliminary injunction hearing off the calendar because the  
7 parties agreed -- they agreed, Your Honor, to the preliminary  
8 relief that Moog said it needed. Took that off calendar, but  
9 ordered and agreed that the parties would work on a framework  
10 for discovery and a briefing schedule leading up to a PI  
11 motion.

12 And, of course, a briefing schedule and discovery,  
13 those are the types of things that are the purposes of this  
14 order that the defendants consented to jurisdiction and venue  
15 for. If the Court needed to enforce a schedule, modify a  
16 schedule, resolve an expedited discovery dispute, the parties  
17 consented to the Court's authority to do that.

18 And that brings us to paragraphs 11 and 12, and these  
19 are the ones that I think really matter most.

20 Paragraph 11, which we see we repeated in the other  
21 stipulation, says that by agreeing to the stipulated order,  
22 defendants consent to the jurisdiction and venue of this court  
23 for purposes of the stipulated order only, and for no other  
24 purpose.

25 And we just went through what those purposes are on

1 its face.

2 Paragraph 12 says this order shall remain in effect  
3 until a hearing on plaintiff's motion for preliminary  
4 injunction takes place and a final ruling on the merits is  
5 issued.

6 And actually, Your Honor, in paragraph 12, it uses  
7 passive voice. A ruling is issued. It's agnostic as to which  
8 court issues -- issues that ruling.

9 And I think we can -- we can put that first  
10 stipulation, ECF-225, aside for now, because I covered the  
11 content. There is nothing in it that says the parties  
12 consented to jurisdiction for the purpose of resolving the  
13 merits motion. It's scheduling, it's discovery, it's  
14 preserving history.

15 THE COURT: Got it.

16 MR. GROSS: Your Honor, I can be a little briefer  
17 with the next stipulation, this is ECF 33. I think, again,  
18 the title is useful. This was a stipulation and proposed  
19 order regarding expedited discovery procedures and a briefing  
20 schedule for the preliminary injunction. A schedule, a  
21 briefing schedule for the preliminary injunction, not an  
22 agreement to which which court has authority to resolve it.

23 So, we see a repetitive paragraph 1 that reminds  
24 everybody of their -- of their obligation to comply with the  
25 earlier stipulation.

1 Paragraph 2 authorizes the parties to serve some  
2 discovery requests.

3 Paragraphs 3 through 5, 7, 10, and 11, authorize  
4 limited depositions and the parameters around them.

5 Paragraph 6, which we've already touched on briefly,  
6 that one sets out a schedule for the discovery, Your Honor,  
7 including an aspirational date for -- oh, excuse me,  
8 including, yeah, including an aspirational date for the  
9 hearing depending on the Court's availability.

10 8 is a paragraph that allows a party to seek to  
11 modify the schedule. And, again, this is the type of thing  
12 the parties consented to the Court having authority to  
13 resolve. If you need to change the schedule and you show good  
14 cause, nobody was going to argue that the Court didn't have  
15 jurisdiction to resolve that dispute.

16 Same with paragraph 9 about discovery disputes. This  
17 paragraph authorized Judge -- authorized the parties to submit  
18 letter briefs to Judge McCarthy to resolve any discovery  
19 disputes that might arise.

20 This is why the consent is limited in scope,  
21 Your Honor.

22 Paragraph 12 says simply that entering into this  
23 stipulation won't be used against any party in a manner to  
24 oppose or support Moog's motion for a preliminary injunction.

25 And paragraph 13, Your Honor, this is the key one



1 that you mentioned before, expressly stating what a purpose of  
2 this stipulation is, it's for expedited discovery.

3 14, now this one's key, too. This repeats the  
4 language that we saw in the other paragraph about the consent  
5 being limited. It's just for purposes of the stipulated  
6 order. But this one actually really hits it on the nose with  
7 the final sentence. It says any and all other challenges to  
8 jurisdiction and venue and here in this Court are explicitly  
9 preserved.

10 And now Moog has argued that any other matters, any  
11 and all other challenges to jurisdiction and venue are  
12 preserved as though the defendants waived their right to  
13 challenge jurisdiction and venue for purposes of merits  
14 disputes. That's not, I think, a fair -- a fair reading.

15 The parties consented to jurisdiction and venue for  
16 limited purposes, and other than that, other than that limited  
17 consent, they explicitly preserve their challenges to the  
18 Court's venue and jurisdiction.

19 So, Your Honor, this is a -- this was really my first  
20 point about how we think that Magistrate Judge McCarthy just  
21 made a mistake in looking at the text. We don't think he  
22 considered the stipulations in their entirety, and we don't  
23 think he considered them accurately. And when the entire  
24 agreements are looked at and examined for what their purposes  
25 are, we think there's really only one inescapable, unambiguous

1 reading here, which is that consent is limited.

2 So, Your Honor, I mentioned there was a second reason  
3 where we saw error in the report and recommendation, and  
4 that's an error of law. We touched on it when I mentioned the  
5 Arrowsmith case to Your Honor, but we think it's legal error  
6 for a district court to proceed with substantive proceedings  
7 on the merits before -- before resolving challenges to the  
8 Court's authority, its personal jurisdiction, its venue, and  
9 considering a transfer motion.

10 I mentioned Arrowsmith, I mentioned In Re: Google and  
11 In Re: Apple, and I'll leave it at that.

12 But there is another error of law that we see in the  
13 report and recommendation, and that's this. It's -- it's the  
14 way Magistrate Judge McCarthy went about his -- his analysis  
15 of the consent, and then his treatment of the venue transfer  
16 motion. It was part of -- it was part of the -- the  
17 jurisdictional and venue challenges that the defendants  
18 brought.

19 And to be clear, Your Honor, they brought it on the  
20 day an answer was due, instead of filing an answer at the  
21 earliest opportunity, they filed these motions.

22 If Magistrate Judge McCarthy was correct, and we  
23 don't think he was, but if he were correct in finding that the  
24 parties through these stipulations consented to the Court's  
25 jurisdiction and venue for the preliminary injunction ruling,

1 then he viewed the stipulation as a forum selection clause.

2 THE COURT: As an exclusive agreement to  
3 jurisdiction, not --

4 MR. GROSS: Yep.

5 THE COURT: -- an agreement to jurisdiction here and  
6 maybe elsewhere.

7 MR. GROSS: That's right, Your Honor. And I think,  
8 again, you're a step ahead of me. In order to --

9 THE COURT: No, no. Believe me, I'm not. I'm not.

10 MR. GROSS: Okay. All right. Well, in order to  
11 support his conclusion, he had to view the -- the stipulations  
12 as an exclusive forum selection clause. And the 2nd Circuit  
13 has dealt with --

14 THE COURT: Right.

15 MR. GROSS: -- exclusive forum selection clauses, and  
16 forum selections clauses that are not exclusive before.

17 And the rule of thumb here is that even a forum  
18 selection clause that clearly selects one forum by the parties  
19 to resolve their disputes unless it contains that sort of  
20 exclusive, exclusionary language saying in no other forum,  
21 then courts generally don't enforce them, and they will  
22 allow -- in fact, they have to deal with venue transfer  
23 considerations. And Magistrate McCarty didn't do that.

24 THE COURT: I got that. I got that. I understand  
25 that. Go to your third point, if you would.

1 MR. GROSS: All right. Okay. Thank you, Your Honor.

2 So we do submit that a 1404 analysis is necessary if  
3 there is a finding of consent, and it wasn't -- it wasn't made  
4 here.

5 So the last point, Your Honor, is really one where I  
6 just want to appeal to our -- the basic sense of, well, really  
7 common sense and fairness here.

8 The -- Skyryse is a small California company.  
9 Mr. Pilkington lives in California. Ms. Kim lives in  
10 California.

11 The plaintiff has conceded in its briefing here that  
12 all of the claims are predicated on its allegations of trade  
13 secret misappropriation, and all of the alleged acts of  
14 misappropriation were said to have occurred in California.

15 It just doesn't make sense that when the parties  
16 enter into a stipulation four days into this case, and the  
17 defendants say we're only consenting for purposes of the  
18 stipulation and reserving explicitly our right to challenge  
19 the courts in Buffalo, New York, a Buffalo, New York courts  
20 jurisdiction and venue, it doesn't make sense to find a  
21 meeting of the minds that they actually agreed that the Court  
22 here would take substantive action and resolve motions as  
23 important as a preliminary injunction. It just --

24 THE COURT: Okay.

25 MR. GROSS: -- doesn't make sense. It's not

1 supported by the text. And it's, frankly, not supported by  
2 even the extrinsic evidence, if the Court is inclined to  
3 consider it, which we've provided in the supplemental brief  
4 that Magistrate Judge McCarthy declined to consider.

5 And then finally, Your Honor, the last point about  
6 the sort of pragmatic issues that I think the motion raises,  
7 and the report and recommendation raises, is that if the Court  
8 were to continue along the path that Magistrate Judge McCarthy  
9 has charted, it raises the very real and, I think, likely  
10 possibility that this Court issue substantive rulings, engages  
11 even further into the merits of the case, devotes more  
12 resources to it, only to then turn to the transfer of  
13 jurisdictional analysis and decide that this case belongs in  
14 the Central District of California where the witnesses and  
15 documents are, and the parallel criminal investigation is  
16 being pursued by the U.S. Attorney's Office in that district,  
17 and then move the case. At which point, there's a risk of  
18 inconsistent outcome, there's a risk of a total waste of  
19 resources, and we think that's a -- for judicial economy, that  
20 should be avoided.

21 So with that, Your Honor, I'm happy to catch my  
22 breath and turn it over to one of my colleagues.

23 THE COURT: Okay. So, Mr. Truitt, is there anything  
24 you would like to add?

25 MR. TRUITT: Yes, Your Honor, thank you.

1           So, Mr. Gross touched on most of the -- of the -- of  
2           the -- of the real salient points, so I just wanted to provide  
3           a couple -- a couple small points to supplement, as well.

4           I think the first thing that we would like to remind  
5           the Court is that stipulations adjourning the return date of a  
6           event that's creating -- that's created by a filing happen all  
7           the time.

8           THE COURT:    Yep.

9           MR. TRUITT:   They happen all the time.  They are  
10          constantly adjourned by a stipulation between the parties  
11          where the parties do not consent to the jurisdiction for the  
12          Court, and a subsequent date before that same court is  
13          established.  And they are constantly interpreted to not  
14          consenting to the jurisdiction of the Court for the very  
15          purpose of what is outlined in the Federal Rules of Civil  
16          Procedure 12(h)(1), which is the only basis to find consent is  
17          when the parties fail to raise it in a responsive motion or an  
18          answer.

19          The second point is, Judge McCarthy's decision, it  
20          says "the Court," but in nowhere in these stipulations is the  
21          Court defined as "the Western District of New York."

22          In their -- there are parts of the stipulation where  
23          Judge McCarthy is specifically identified, so you know those  
24          things specifically refer to Judge McCarthy.

25          However, there is no basis to say "the Court" should

1 mean "the Western District of New York" as opposed to the  
2 Court that is deciding or required to evaluate the  
3 merits-based decision or whether or not this stipulation needs  
4 to be enforced.

5 Now, the first stipulation is designed to preserve  
6 evidence, and prevent, you know, provide certain restrictions  
7 as the parties are -- are preparing for a -- a -- a  
8 preliminary injunction hearing.

9 But the parties well knew that there were  
10 jurisdictional disputes at issue because they were reserved.  
11 And the purpose of that stipulation is simply to preserve  
12 those protections to the plaintiff in the event that  
13 jurisdiction is found to not exist and the case is dismissed.

14 The second thing is that Judge McCarthy --

15 THE COURT: So your argument -- your argument is that  
16 when the stipulation uses the words "the Court," it means  
17 generically "the Court where the case is then pending," not --

18 MR. TRUITT: No, I think it's two points, Your Honor.

19 THE COURT: Go ahead.

20 MR. TRUITT: I think -- that is my interpretation of  
21 it. But there's another point that comes to drafting. And if  
22 there is a term that is ambiguous, and here, Judge McCarthy's  
23 interpretation of "the Court" meaning "the Western District of  
24 New York" specifically creates an ambiguity, where I would say  
25 none exists, then the proper procedure for the Court would

1 have been to look to the extrinsic evidence, which Mr. Gross's  
2 firm submitted in papers that were not -- that were not  
3 considered by the Court.

4 THE COURT: Got it. Got it, yep.

5 MR. TRUITT: So now the second thing is that the  
6 report and recommendation, it doesn't -- it doesn't address  
7 the full -- the full text, and -- or even the full sentence of  
8 what it refers to.

9 So I have to pull up docket number 33, and then we go  
10 down to --

11 THE COURT: Hang on.

12 MR. TRUITT: -- the last paragraph.

13 THE COURT: Hang on, hang on.

14 MR. TRUITT: -- and the portion --

15 THE COURT: Wait, wait, wait. Stop, stop, stop.

16 MR. TRUITT: Sorry, sir.

17 THE COURT: 33 is the second stipulation?

18 MR. TRUITT: Yes, sir.

19 THE COURT: Okay. I got it. Go ahead.

20 MR. TRUITT: Okay. So in the report and  
21 recommendation, the language that Judge McCarthy uses from  
22 paragraph 14 is: By agreeing to this stipulated order, comma,  
23 defendants consent to the jurisdiction and venue of the Court  
24 for purposes of this stipulated order.

25 And that's where it stops in the report and



1 recommendation.

2 But the full sentence says: Only and for no other  
3 purpose.

4 And then there's another sentence that says: Any and  
5 all other challenges to jurisdiction and venue in the Western  
6 District of New York are explicitly preserved.

7 So when you are -- the stipulations at no point say  
8 there is an express consent to the Western District of  
9 New York.

10 So when you are looking at that consent and then  
11 applying it for another purpose other than the demarked  
12 purposes in the stipulation, you are essentially finding that  
13 consent for another purpose which violates the express  
14 language of the stipulation.

15 So if the Court had used the full sentence --

16 THE COURT: I got it.

17 MR. TRUITT: -- it would reach the opposite  
18 conclusion.

19 Finally, you know, reservations of rights which,  
20 again, are not commonly used in jurisdictional stipulations  
21 anymore because of Rule 12(h), but they are designed to be a  
22 complete defense against the very argument that Moog has  
23 raised now, which is that some sort of waiver, consent,  
24 estoppel needs to exist because we have already agreed to  
25 participate in limited discovery during the pendency of these

1 motions.

2 Now, in every other context when they are used, a  
3 reservation of right is considered to be a hands-down, no  
4 dispute, complete defense to the very arguments that Moog has  
5 raised.

6 So for the Court to reach its decision without  
7 addressing the fact that there is an express reservation of  
8 the right to challenge any and all other challenges is -- is,  
9 again, just taking the stipulation out of context.

10 Finally, the last point that we wanted to make right  
11 now, unless we're going to address the actual merits of the  
12 jurisdictional motions that were --

13 THE COURT: No, we're not. We're not.

14 MR. TRUITT: -- is that plaintiff's argument, which  
15 was first raised in emails to the Court, has never been  
16 alleged against our clients.

17 We did not file a supplemental brief as Gabe's client  
18 did, because we did not want plaintiff doing the very thing  
19 that it's done, which is raise new arguments that we would not  
20 get a chance to respond to.

21 So we did not take Magistrate Judge McCarthy up on  
22 his opportunity to advise the Court of further developments as  
23 it would affect a venue motion.

24 So, the arguments that plaintiff has now raised,  
25 which is the basis of the RRO as it respects to the

1 jurisdictional motions, they do not appear in any responsive  
2 paper to the plaintiffs.

3 THE COURT: Okay. Okay.

4 MR. TRUITT: I mean, sorry, to the individual  
5 defendants.

6 THE COURT: Got it. Thank you.

7 MR. TRUITT: Thank you, Your Honor.

8 THE COURT: Ms. Dutta?

9 MS. DUTTA: Good afternoon, Judge.

10 I -- I find it difficult to understand defendants'  
11 reading of these stipulated orders, Your Honor.

12 I think if you look to the first order, the  
13 March 11th order, paragraph 11 says expressly, by agreeing to  
14 this stipulated order, defendants consent, consent, to the  
15 jurisdiction and venue of this Court for purposes of the  
16 stipulated order only and for no other purpose.

17 That stipulated order, Judge, sets a hearing date on  
18 the preliminary injunction motion.

19 THE COURT: Where does it say that this Court can  
20 grant or -- or can decide the preliminary injunction? Where  
21 do they -- where do they explicitly agree to this Court's  
22 jurisdiction to decide the preliminary injunction?

23 MS. DUTTA: Judge, they agree to it for purposes of  
24 the stipulated order.

25 THE COURT: Where? Where? Give me the language --

1 give me the language of the order that says the Western  
2 District of New York is going to decide the preliminary  
3 injunction.

4 MS. DUTTA: Well, Judge, paragraph 10 of the first  
5 stipulation. Hearing. On or after --

6 THE COURT: Hearing. That's a hearing. That's a  
7 hearing, that's not a decision.

8 I want -- I want the language that says that they're  
9 stipulation to merits-based relief in this Court.

10 They've reserved the right to challenge this Court's  
11 jurisdiction, and so what I -- what I want is language that  
12 says that this Court is to decide the preliminary injunction.

13 MS. DUTTA: Judge, I think you get there from  
14 paragraphs 10 to 12 of that first stipulation, setting a  
15 hearing date subject to this Court -- the Court, the Court,  
16 capital C, Court, choosing, by agreeing to the order  
17 defendants consent to the jurisdiction of this Court for  
18 purposes of stipulated order, and this stipulated order  
19 remains in effect until a hearing on the motion for  
20 preliminary injunction and a final ruling takes place.

21 THE COURT: But the order -- the -- the whole crux of  
22 the order is to expedite discovery and set a briefing  
23 schedule. That's the whole idea behind the order, isn't it?

24 MS. DUTTA: Your Honor, respectfully, I disagree.

25 Paragraph 1 of the first order, defendant shall

1 refrain from using, accessing, disclosing, copying,  
2 transmitting for any purpose any non-public information.

3 This is the temporary relief that Moog was moving for  
4 when it --

5 THE COURT: Yeah, which is -- which is -- which is to  
6 put off the date of the TR -- which is to put off the  
7 necessity for a TRO.

8 I mean, the defendants say you've already gotten what  
9 you've asked for in your request for a preliminary injunction.  
10 Why isn't that correct? Why haven't you gotten what you  
11 wanted in your preliminary injunction.

12 MS. DUTTA: Your Honor, we resolved the temporary  
13 restraining order and set in place a schedule for expedited  
14 discovery so that Moog could understand and develop the  
15 factual information around what happened here.

16 THE COURT: So what more do you want? What's the  
17 preliminary relief that you don't have now that you want?

18 MS. DUTTA: Your Honor, the parties are still in the  
19 midst of discovery. Depositions haven't even occurred yet.  
20 We will --

21 THE COURT: And you can't tell me any preliminary  
22 relief that you don't have now that you want now?

23 MS. DUTTA: I can't right now, Judge, but we're  
24 entitled to --

25 THE COURT: So -- so why isn't that very, you know,

1 Mr. Gross makes a pretty compelling argument that if this case  
2 belongs in California, it belongs in California now, not after  
3 I, perhaps, say that there's a likelihood of success on the  
4 merits, and the Court in California says the hell there is.

5 You know, why isn't there a compelling practical  
6 reason to send this case to California now if, in fact, the --  
7 this Court venue is appropriate there, not here?

8 MS. DUTTA: Well, Your Honor, looking at the docket  
9 in this case, this case was filed I believe -- it was in  
10 March, and there's almost 300 docket entries since that time.  
11 It's not even been a full year. All of those docket entries  
12 spring from these two stipulations.

13 The parties negotiated for and agreed to expedited  
14 discovery. At this point --

15 And that discovery should be counted against Skyryse,  
16 Your Honor, for purposes of the motion of transfer. They've  
17 agreed to it. It's happened, there's been numerous --

18 THE COURT: What do you mean, counted against them?

19 MS. DUTTA: Your Honor, they reference two cases, In  
20 Re: Google and In Re: Apple, in which the courts held that  
21 litigation that occurred after the motion to transfer should  
22 not be counted against the moving parties because they had  
23 already made their motion.

24 That's not the case here, Judge, because both -- all  
25 the parties contemplated discovery in these two stipulations.

1 They agreed to it at the outset before those motions to  
2 transfer were filed. And as a result of that, we've got  
3 almost 300 docket entries, numerous appearances in front of  
4 Judge McCarthy and Your Honor.

5 At this point, transferring the case to California  
6 would be hugely inefficient.

7 THE COURT: Okay. Tell me -- okay, explain that to  
8 me. Explain -- explain why transferring the case to  
9 California now would be inefficient for this Court. What's  
10 going to happen that's inefficient?

11 MS. DUTTA: Your Honor, a new judge, a new court  
12 would have to start from scratch.

13 THE COURT: Why? Why? There's been a -- you have a  
14 stipulation that covers expedited discovery, that will remain  
15 in effect because it's going to remain in effect until a  
16 hearing on the plaintiff's motion for preliminary injunction  
17 takes place and a final ruling on the merits is issued.

18 MS. DUTTA: Your Honor, the amount of familiarity,  
19 the amount of briefing that has already been done in front of  
20 this Court, the active involvement of Magistrate Judge  
21 McCarthy in the discovery disputes, of which there have been  
22 many, that's -- that's not going to be easily replicated  
23 without a substantial amount of time by a new judge and a new  
24 court. And why? They've agreed --

25 THE COURT: Because -- because -- because if I don't

1 have jurisdiction and I enter relief -- well, for two reasons,  
2 I guess, to answer your question.

3 Number 1, because if I don't have jurisdiction, how  
4 would I enter a merits-based relief against a party over which  
5 I don't have jurisdiction?

6 So I -- so I enter merits-based relief against  
7 Skyryse, and I say, oops, never had jurisdiction in the first  
8 place. That's a problem. Especially because, as -- as I  
9 think you and I might be able to agree, there's nothing that  
10 explicitly says in either of these stipulations, that this  
11 Court is to decide a preliminary injunction motion; and then

12 Number 2, because if the case ends up getting  
13 transferred -- putting that aside, let's -- let's put that  
14 aside, if the case ends up getting transferred after the  
15 preliminary injunction is issued, a judge in California is  
16 going to have to get up to speed then anyway.

17 So not only have we wasted the time that this Court  
18 has spent getting up to speed to enter the preliminary  
19 injunction, we now have the court in California having to do  
20 everything that it would have had to do three or four or six  
21 months earlier had I transferred it earlier on.

22 Aren't those two good reasons?

23 MS. DUTTA: That's a very good reason, Your Honor,  
24 not to transfer the case, period, the end. Before or after  
25 the preliminary injunction. Absolutely.



1 THE COURT: Right. So your argument is that by  
2 entering into this stipulation, they really didn't reserve  
3 their right to -- to raise jurisdictional arguments, they  
4 really consented to jurisdiction wholesale?

5 MS. DUTTA: Judge, we absolutely take the position  
6 that they have forfeited arguments for purpose of the entire  
7 case relating to jurisdiction and venue, for purposes of --

8 THE COURT: Even though -- even though the explicit  
9 language of the agreement says they consent to jurisdiction  
10 and venue of this Court for purposes of the stipulated order  
11 only?

12 How do you -- how do you give meaning to that by --  
13 with your argument? How -- how does that provision, you know,  
14 there's a -- a principle that the Court should try to give  
15 meaning to every provision of a contract.

16 How do I give meaning to that provision if I accept  
17 what you're arguing to me now?

18 MS. DUTTA: Your Honor, we made this argument in our  
19 papers, and our argument is that their litigation conduct has  
20 forfeited that reservation of rights.

21 They have litigated in this Court. They have agreed  
22 to these two stipulated orders that have spawned discovery  
23 leading to 300 docket entries' worth of discovery issues and  
24 disputes, Your Honor. That is conduct that evidences a  
25 forfeiture of this defense for the entire case.

1 THE COURT: But their conduct was simply to comply  
2 with the stipulation that they entered into, right?

3 MS. DUTTA: That they entered into, exactly,  
4 Your Honor.

5 THE COURT: Right. And the stipulation says  
6 explicitly, both of them, the defendants consent to the  
7 jurisdiction and venue of this Court for purposes of this  
8 stipulated order only.

9 I mean, isn't your argument circular? That -- that  
10 -- that because they stipulated to the purposes of this order,  
11 and because this order really stipulates to jurisdiction  
12 generally, they've stipulated to jurisdiction generally and,  
13 therefore, that provision doesn't mean anything? I mean,  
14 that's a circular argument, isn't it?

15 MS. DUTTA: No, Your Honor, because they have -- they  
16 have actively litigated in this Court.

17 THE COURT: By doing what?

18 MS. DUTTA: By engaging in the discovery contemplated  
19 by these orders, which, like I said, Your Honor, has spawned a  
20 number of disputes. We have -- we have been actively engaged  
21 in litigation in this Court, all the parties.

22 THE COURT: Let me ask you this. What about -- what  
23 about Mr. Gross's argument that even if they did stipulate to  
24 venue in this Court, that that is not a stipulation to venue  
25 exclusively in this Court?

1 MS. DUTTA: Well, first, I would note, Judge, that  
2 they have -- defendants have a very high burden to transfer  
3 from plaintiff's initial filing. They have to show by clear  
4 and convincing evidence a strong case for transfer.

5 Secondly, it is undisputed that Magistrate Judge  
6 McCarthy's order as far as a motion to transfer is reviewed  
7 under clearly erroneous standard. That's a very highly  
8 deferential standard.

9 THE COURT: What's the basis for this Court's venue?

10 MS. DUTTA: I'm sorry, Judge?

11 THE COURT: What is the basis for this Court's venue?

12 MS. DUTTA: Substantial -- the underlying facts, as  
13 substantial underlying facts have occurred in this venue.

14 THE COURT: Okay. And what substantial underlying  
15 facts occurred here?

16 MS. DUTTA: The trade secrets that were  
17 misappropriated by defendants were housed in this district.  
18 And that, Your Honor --

19 THE COURT: Where were they misappropriated?

20 MS. DUTTA: I'm sorry, Your Honor?

21 THE COURT: Where were they misappropriated?

22 MS. DUTTA: They -- they were housed here, and they  
23 were misappropriated by defendants in California. Well, they  
24 were accessed by defendants in California, improperly  
25 accessed.

1 THE COURT: And they were housed here. When you say  
2 they're housed here, how are they housed here?

3 MS. DUTTA: They are stored in a server located in  
4 East Aurora, Your Honor.

5 THE COURT: The server is physically located in  
6 East Aurora?

7 MS. DUTTA: Correct.

8 THE COURT: Okay.

9 MS. DUTTA: And in addition to that, Your Honor, the  
10 individual defendants worked for an East-Aurora-based company,  
11 they were overseen by a manager in East Aurora, they had  
12 regular communications with East Aurora, they traveled to  
13 East Aurora as part of their employment.

14 Moreover, Skyryse engaged in poaching of  
15 East-Aurora-based employees, Your Honor.

16 So there are a number matters of venue, Your Honor.

17 THE COURT: Okay. Okay. Okay. Any other arguments  
18 you want to make to me about the text of the stipulations?

19 MS. DUTTA: Your Honor, I would just note again that  
20 paragraph 12 in the first stipulation presupposes that those  
21 stipulated orders remain in place until a final ruling on the  
22 merits of the issue, and that presupposes this Court making  
23 that ruling.

24 THE COURT: Why -- no. So the second -- the second  
25 sentence you just said, I think, to me, is a non sequitur.

1           Why does that presuppose that the ruling is going to  
2 be made in this Court?

3           MS. DUTTA: Because the hearing is scheduled for this  
4 Court.

5           THE COURT: Okay. Your friends on the other side say  
6 that that's not necessarily the case because the words "the  
7 Court" can be interpreted -- can mean "the Court where a case  
8 is then pending." And they -- and they support that argument  
9 with the references to Judge McCarthy, which seem to suggest  
10 that where the parties wanted to say "the Western District of  
11 New York," they didn't want to do it by saying Judge McCarthy,  
12 and where they wanted to use the more generic term "the Court"  
13 that they wanted to do that, too. Why isn't that correct?

14           MS. DUTTA: Your Honor, the reference to Magistrate  
15 Judge McCarthy, that's in the second stipulation in  
16 paragraph 9, it's specifically to reference his standing order  
17 regarding discovery disputes and how those disputes are to be  
18 addressed.

19           Also, in that second order, paragraph 14, by agreeing  
20 to this stipulated order, defendants consent to the  
21 jurisdiction and venue of the Court, the Court, for purposes  
22 of the stipulated order and for no other purpose. Any and all  
23 other challenges to jurisdiction and venue in the Western  
24 District are preserved. The Court and the Western District  
25 are the same.

1 THE COURT: Okay. Okay. Do you want to address  
2 the -- the -- the third -- the common-sense argument that  
3 Mr. Gross made? That this case belongs in California and  
4 belongs in California now, and -- and the problems that might  
5 occur were this Court to enter merits-based relief now and  
6 then decide, oops, didn't have jurisdiction.

7 MS. DUTTA: Your Honor, we -- we believe that there  
8 is jurisdiction for purposes of the preliminary injunction  
9 hearing and that decision.

10 THE COURT: No, I know that. But my point is,  
11 Judge McCarthy decided to do this jurisdictional motion  
12 piecemeal. He decided to say -- he decided to say, look it,  
13 we've got jurisdiction for purposes of the preliminary  
14 injunction hearing, and I'm going to put off the decision on  
15 the jurisdictional issue overall later on.

16 So that creates the possibility of the Court now  
17 granting preliminary injunction merits-based relief, and then  
18 finding it was without jurisdiction. That is a possibility  
19 inherent in what Judge McCarthy decided.

20 Mr. Gross says, Judge, that's -- that's nonsensical,  
21 that's -- that's -- it defies common sense to have one court  
22 granting merits-based relief, and then finding that it didn't  
23 have jurisdiction to grant that -- maybe I'm overstating  
24 because I may have jurisdiction to grant the merits-based  
25 relief because your argument is I have limited jurisdiction to

1 a preliminary injunction.

2 And Mr. Gross says -- and I'm sorry if I'm misstating  
3 your argument as well as you did, Mr. Gross -- but there's a  
4 common-sense problem with the Court granting merits-based  
5 relief and then finding it doesn't have jurisdiction over the  
6 case and transferring the case to another court that will have  
7 to consider the same sorts of issues.

8 So, as a -- as a for instance, like we would with  
9 success on the merits, like I said earlier, I make a decision  
10 saying you're entitled to a preliminary injunction because  
11 it's likely that you're going to succeed on the merits. And  
12 the court in California says the hell it is.

13 Isn't that a compelling common-sense argument to  
14 transfer the case now?

15 I'm not saying that carries the day, Ms. Dutta,  
16 because there are other issues, legal issues. But -- but  
17 isn't there -- there's some merit to what Mr. Gross is saying  
18 by way of common sense?

19 MS. DUTTA: Your Honor, that -- I think that that  
20 presupposes we would lose on personal jurisdiction for the  
21 remainder of the case, and I don't think we do. And we're  
22 happy to discuss that, but I think we --

23 THE COURT: It doesn't -- it doesn't presuppose it,  
24 it just -- it just raises the possibility that you might.

25 MS. DUTTA: And if it does, we'll go elsewhere,

1 Judge. But this --

2 THE COURT: And that would create -- and that would  
3 create the common-sense problems that Mr. Gross pointed to,  
4 correct?

5 MS. DUTTA: No, Your Honor. Because we would have,  
6 or not, a preliminary injunction motion, or preliminary  
7 injunction decision to which the parties had already consented  
8 to jurisdiction.

9 THE COURT: Okay. Okay. Mr. Gross, Mr. Truitt,  
10 anything further?

11 MR. GROSS: Your Honor, we're happy to -- we're happy  
12 to submit it on these arguments. Thank you.

13 THE COURT: Okay. Mr. Truitt?

14 MR. TRUITT: The same, Your Honor.

15 THE COURT: Okay. Terrific. Okay, folks, thank you  
16 very much. I appreciate the arguments, both sides, well  
17 argued. And we will issue a decision.

18 MR. GROSS: Thank you, Judge.

19 MR. TRUITT: Thank you, Your Honor.

20 MS. DUTTA: Thank you, Judge.

21 (Proceedings concluded at 3:26 p.m.)

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**CERTIFICATE OF REPORTER**

In accordance with 28, U.S.C., 753(b), I  
certify that these original notes are a true and correct  
record of proceedings in the United States District Court for  
the Western District of New York on November 29, 2022.

s/ Ann M. Sawyer

Ann M. Sawyer, FCRR, RPR, CRR,  
NYRCR, NYACR, Notary Public  
Official Court Reporter  
U.S.D.C., W.D.N.Y.